UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELTIONS BOARD

TRIPLE A FIRE PROTECTION, INC.)
Respondent,))
and) Case 15-CA-11498
ROAD SPRINKLER FITTERS LOCAL UNION 669, U.A., AFL-CIO)))
Charging Party.))

CHARGING PARTY LOCAL 669'S ANSWERING BRIEF IN OPPOSITION TO RESPONDENT TRIPLE A'S EXCEPTIONS

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Charging Party Road Sprinkler Fitters Local Union No. 669, U.A., AFL-CIO ("Local 669" or "the Union"), by its undersigned counsel, hereby submits this Answering Brief in opposition to Triple A's Exceptions and Brief in Support. As shown herein, Administrative Law Judge Keltner W. Locke correctly concluded that the credible evidence in the record and settled Board precedent require that Respondent Triple A Fire Protection, Inc. ("Triple A" or "the Respondent") be ordered to pay in full, according to the General Counsel's Third Amended Compliance Specification: (i) backpay to each bargaining unit employee employed by Triple A from April 22, 1991 until Respondent remedies its unfair labor practices; (ii) all of the contractually-required contributions to the National Automatic Sprinkler Industry Pension Fund, the NASI Welfare Fund, and the NASI-Local 669 Industry Education Fund ("the NASI Benefit Funds"), as required by the terms of the 1988-1991 Local 669 National Agreement; and (iii) liquidated damages as well as interest on the delinquent NASI Benefit Fund contributions, as required by the 1988-1991 Local 669 National Agreement, operative NASI Benefit Fund documents, practices, and applicable law.

I. INTRODUCTION

This compliance proceeding involves a controversy over the total amount of back pay and benefit fund contributions that are due under the National Labor Relations Board's October 31, 1994 Decision and Order in *Triple A Fire Protection, Inc.*, 315 NLRB 409 (1994), *enf'd*, 136 F.3d 727 (11th Cir. 1998), *cert. denied, Triple A Fire Protection, Inc. v. NLRB*, 525 U.S. 1067 (1999). GC X. 2(a), ALJD, p. 2.¹

In that decision, the NLRB affirmed the Administrative Law Judge ("ALJ")'s decision that Triple A violated Sections 8(a)(1) and (5) of the National Labor Relations Act ("NLRA" or "the Act") by, *inter alia*, unlawfully dealing directly with bargaining unit employees, unilaterally and unlawfully changing terms and conditions of employment for bargaining unit employees without first bargaining to impasse with Local 669 after the expiration of the Parties' 1988-1991 collective bargaining agreement, including by reducing the wage rates that it paid to bargaining unit employees and by unlawfully discontinuing participation in the Union's benefit funds, and the corresponding Order that Triple A make whole both the bargaining unit employees and the NASI Benefit Funds for its proven violations of the Act. *Id.* at 416; ALJD, p. 2.

II. STATEMENT OF THE CASE

This case began on April 4, 1991, when Local 669 filed unfair labor practice charges against Triple A, alleging that Respondent violated the Act by dealing directly with bargaining unit employees, unilaterally changing terms and conditions of employment for bargaining unit employees without first bargaining to impasse with Local 669 after the expiration of the Parties' 1988-1991 collective bargaining agreement by, *inter alia*, reducing the hourly wage rates that it paid to unit employees, and unilaterally discontinuing participation in, and making the

¹ ALJ Locke's February 10, 2010 Compliance Decision will be referred to in this Brief as "Compliance Decision," and will be cited to as ALJD, p. ____.

contractually required payments to, the NASI Benefit Funds. *Triple A Fire Protection, Inc.*, 312 NLRB 1088, 1089 (1993).

On September 27, 1991, Region 15 issued an unfair labor practice Complaint on the Union's charges, and a hearing was held before Administrative Law Judge Richard J. Linton, over seven days throughout 1992. *Id.* at 1089. On July 12, 1993, Judge Linton dismissed the Complaint on procedural grounds, finding that the Parties' collective bargaining relationship was not governed by Section 9(a) of the Act. *Id.* at 1094. However, on October 19, 1993, the Board reversed the ALJ's decision on that issue, confirmed that Local 669 was the Section 9(a) representative of the bargaining unit at Triple A, and remanded the case to Judge Linton for a decision on the merits of the Complaint. *Id.* at 1089.

On January 19, 1994, Judge Linton issued his Supplemental Decision and Order in this case, finding completely in favor of the General Counsel, and holding that Triple A unlawfully and unilaterally changed the terms and conditions of employment for bargaining unit employees, without bargaining to impasse by, *inter alia*, unilaterally reducing the wage rates under the Parties' 1988-1991 Agreement, and unilaterally ceasing to make payments to the NASI Benefit Funds required by that Agreement. *Triple A Fire Protection, Inc.*, 315 NLRB at 416; ALJD, p.2.

Judge Linton also rejected *all* of the affirmative defenses that Triple A raised in that case, including, *inter alia*, allegations that Local 669: (i) engaged in piecemeal bargaining; (ii) bargained in bad faith with Triple A; (iii) attempted to force Triple A to adopt a multi-employer agreement; and (iv) engaged in a strike against Triple A. *Id.* at 416-422.

Accordingly, Judge Linton ordered Triple A to make the bargaining unit employees whole, and he also separately ordered Triple A to "make whole the benefit funds for all contributions that would have been paid but for TAF's unlawful discontinuance of payments."

Id. at 422, 423. In addition, Judge Linton left for the compliance stage of the case the issue of whether, as part of the make—whole remedy running to the NASI Benefit Funds, Respondent "must pay additional amounts into the benefit funds in order to satisfy this make-whole remedy. *Merryweather Optical Co.*, 240 NLRB 1213 (1979)." *Id.* at 422, n. 3.

On October 31, 1994, the Board upheld Judge Linton's Supplemental Decision on Remand in its entirety, including all of the remedial provisions that he recommended. *Triple A Fire Protection, Inc.*, 315 NLRB 409, 409 (1994). ALJD, p.2. Subsequently, both of the NLRB decisions discussed above were enforced in their entirety by the United States Court of Appeals for the Eleventh Circuit, and Triple A's Petition for *certiorari* was ultimately denied. *NLRB v. Triple A Fire Protection, Inc.*, 136 F.3d 727 (11th Cir. 1998), *cert. denied, Triple A Fire Protection, Inc. v. NLRB*, 525 U.S. 1067 (1999). ALJD, p.2.

A. The Compliance Case Begins.

Remarkably, Triple A has steadfastly refused to comply with the Board's Order for over fifteen (15) years.² Accordingly, on July 1, 2008, Region 15 issued the Third Amended Compliance Specification in this case, and, on August 18, 2008, Triple A filed its Answer. GC Exh. 2(dd); 2(ii); ALJD, p.2.

Triple A's Answer consisted of forty-six (46) pages, and raised over twelve (12) affirmative defenses. GC Exh. 2(ii). However, Respondent's Answer consisted of only a

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² Given Triple A's refusal to comply with the Court of Appeals Decision enforcing the Board's Order, the NLRB filed a petition for civil contempt of court on November 9, 1999 in the Eleventh Circuit. GC Exh. 2(g); ALJD, p.2. While contempt proceedings were pending, on April 18, 2000, the Region issued its initial Compliance Specification and Notice of Hearing in this case. However the compliance proceedings were postponed while the Board continued to litigate the contempt case against Triple A. GC Exh. 2(r). After the contempt proceedings concluded unsuccessfully for the Board, a Second Amended Compliance Specification and Notice of Hearing issued on July 28, 2005. GC Exh. 2(u). That hearing was indefinitely postponed after Hurricane Katrina hit New Orleans in August, 2005.

general denial of the backpay calculations in the Specification (GC Exh. 2(ii), pp.1-4), without setting forth any alternative formula for calculating backpay, and many of the affirmative defenses Triple A raised had been previously rejected below by the ALJ, the Board, and the Eleventh Circuit. GC Exh. 2(ii), pp. 2-46. Accordingly, on November 12, 2008, the Union filed a Motion for Partial Summary Judgment and a Motion to Strike Portions of Respondent's Answer, which the General Counsel joined. GC Exh. 2(pp); 2(ggg); ALJD, p. 2.

B. The Board Grants Local 669's Motion for Partial Summary Judgment and to Strike Most of Triple A's Affirmative Defenses, and Rejects Triple A's Motion for Summary Judgment.

On December 22, 2008, after rescinding its initial Summary Judgment Order granting the Union's Motion, the Board issued a Notice to Show Cause why the Union's Motion should not be granted. GC Exh. 2(vv); ALJD p. 2. Triple A filed a Response to the Notice to Show Cause, and then filed its own Motion for Summary Judgment, in which it simply raised the same arguments it raised as Affirmative Defenses in its Answer. GC Exh. 2(ww); ALJD, p. 3.

On January 30, 2009, the Board granted Local 669's Motion for Partial Summary Judgment, granted in part Local 669's Motion to Strike Triple A's Affirmative Defenses, and denied Triple A's Motion for Summary Judgment in its entirety. *Triple A Fire Protection, Inc.*, 353 NLRB No. 88, slip op. at 1-4, (2009); GC Exh. 2(hh); ALJD p. 3. Specifically, the Board granted summary judgment against Triple A on the calculations of the gross amount of backpay and benefit fund contributions that Triple A owed as a result of its unfair labor practices, as established by the calculations set forth in the Third Amended Compliance Specification. *Triple A Fire Protection*, 353 NLRB at 3; ALJD, p.3.

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³ This decision will be referred to in this Brief to as the "Summary Judgment Decision."

As the Board held, "Respondent did not answer paragraphs 7 through 10 of the Specification [the paragraphs dealing with backpay and fringe benefit computations] with the specificity required by Section 102.56(b)[,]" which places the following requirements on Respondents that wish to deny certain matters that are within their knowledge:

"... if the Respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, the answer shall specifically state the basis for such disagreement, setting forth in detail the respondent's position as to the applicable premises and furnishing the appropriate supporting figures." 353 NLRB at 3; ALJD, p.3.

The Board also struck the affirmative defenses that had already been rejected in the unfair labor practice proceedings below that Triple A tried to resurrect in its Answer, including, *inter alia*, yet another challenge to the Union's 9(a) status; Respondent's second affirmative defense alleging that the Union terminated the collective bargaining agreement and struck Triple A on March 31, 1991; its fourth affirmative defense alleging that the backpay calculations were somehow improperly based upon the union security clause of the parties' collective bargaining agreement, which Triple A alleged became inoperative on April 1, 1991; paragraph 4 of Triple A's Answer, in which Triple A denied that it unilaterally reduced wages and again incorrectly alleged that the Union struck Triple A; and Triple A's twelfth affirmative defense, which alleged the Union engaged in piecemeal bargaining or somehow bargained in bad faith with Triple A. *Id.* at 2-3; ALJD, pp. 4-5.

Moreover, in denying Triple A's Summary Judgment Motion, the Board expressly rejected Triple A's argument that the Compliance Specification was legally deficient because Triple A should *only* be required to make benefit fund contributions on behalf of those employees who had a vested interest in the Union's benefit funds, on the grounds that the make-

whole remedy running to the NASI Benefit Funds in this case is *not* dependent upon whether unit employees have an economic interest in those funds. *Id.* at 2; ALJD, pp. 13-14.⁴

The Summary Judgment Decision also established firm ground rules for the Compliance Hearing in this case, which took place on May 5 and 6, in Mobile, Alabama. ALJD, p. 3.

C. The Compliance Hearing.

During the hearing, Triple A did not dispute that, from April 22, 1991 through the date of the hearing, it *never* resumed participation in the NASI Funds, *never* made any unit employees whole for its unilateral reduction of their wages, *never* resumed payment of the wage rates set forth in the 1988-1991 National Agreement, and *never* made any contributions to the NASI Benefit Funds, all as required by the underlying Board Order. Tr. 25-34; 211; GC Exh. 2(dd); 2(ii); ALJD, pp. 6-7, 12-14.⁵

Similarly, even though the Board's Summary Judgment Decision precluded Respondent from challenging the actual backpay calculations themselves, Triple A did not challenge or otherwise attempt to contradict any of the General Counsel's evidence relating to the Compliance Specification (*i.e.* Triple A did not try to prove that any of the discriminatees were not members of the bargaining unit, or attempt to introduce other evidence to show that the gross

⁴ On September 8, 2009, Triple A filed a forty-seven page Motion for Reconsideration of the Board's Summary Judgment Decision, *six months* out of time under the Board's rules, and over *four months* after the compliance hearing was held in this case. NLRB E-Docket 9/9/2009. Both the General Counsel and Local 669 opposed that Motion, and the Executive Secretary rejected it as untimely and did not transmit it to the Board. NLRB E-Docket 9/10/2009.

⁵ Although the Summary Judgment Decision established Triple A's gross monetary liability in this proceeding, Triple A moved to file an Amended Answer to the Third Amended Compliance Specification on May 1, 2009, in a transparent attempt to try and challenge yet again the backpay and NASI Benefit Fund contribution calculations that were established by the Board's Decision. GC Exh. 2(iii); R Exh. 1. This Motion was properly denied at trial, and Respondent's Amended Answer was rejected. Tr. 15.

backpay liability amount established in the Summary Judgment Decision should otherwise be reduced). ALJD, p. 6.

Triple A did, however, introduce some evidence that, in its estimation, supported three of Respondent's affirmative defenses: that the Union allegedly abandoned the bargaining unit at Triple A (Tr. 92, 118, 170-180); that the Union allegedly lost its majority status (Tr. 91), and that Triple A would be financially unable to pay the amounts in the Compliance Specification. Tr. 140-141; 137-53; 196-202. It is worth noting that Triple A waived the other affirmative defenses in its Answer that were not previously rejected by the Board, *i.e.* that an award of backpay and pension contributions would constitute a "windfall" to the NASI Benefit Funds and/or to the discriminatees, by not presenting any evidence to support them at the hearing.

D. Judge Locke's Compliance Decision.

On February 10, 2010, Judge Locke issued his Compliance Decision in this case. After recounting the relevant procedural history in this case discussed above, including a detailed recitation of the Summary Judgment Decision that governed the hearing, Judge Locke held that the General Counsel met its burden of proof on the entire Compliance Specification.

Specifically, Judge Locke held that the General Counsel established the following six points: (i) since April 22, 1991 Respondent employed a total of 423 employees as identified in Appendix A of the Specification (ALJD, p.7); (ii) Respondent violated the Act by unilaterally reducing the wage rates of these employees below the contractually required wage rates and NASI Benefit amounts as set forth in the Specification (*id.*, p. 6-7); (iii) the NASI Benefit Fund contributions were mandatory subjects of bargaining that Respondent could not alter without bargaining to impasse (*id.* at 12-13); (iv) Triple A failed to introduce any evidence that any of the 423 employees listed in the Specification were not members of the bargaining unit, or any other

evidence that "... might exist to support an argument that a certain individual was not affected by the unlawful wage rate reduction[;]" (id. at 6-7); (v) that the backpay and fringe benefit calculations in the Specification were established by the Summary Judgment Decision and were therefore controlling (id. at 7); and (vi) that because the Parties' Agreement and the governing documents of the NASI Benefit Funds provided for payment of liquidated damages and interest on delinquent contributions to the Funds, Triple A was also required to pay those additional amounts on its delinquent Fund contributions. Id. at 13.

Moreover, Judge Locke rejected all of the "affirmative defenses" that Triple A attempted to litigate at the Hearing. To that end, the ALJ held that Respondent's "inability to pay" defense was not even relevant to the compliance proceedings and, even if it were, Triple A failed to carry its burden of proof on that issue (*id.* at 9-12); Local 669 had not lost majority status at Triple A (*id.*, p. 8); the Union did not abandon the bargaining unit at Triple A (*id.* at 8-9); and that ordering Respondent to make its delinquent contributions to the NASI Fringe Benefit Funds would neither be punitive in nature, nor constitute a "windfall" to the Funds under the facts of this case. *Id.* at 14.

Accordingly, Judge Locke concluded that the appropriate amounts of total backpay owed to the discriminatees was \$3,846,526.81, the total of NASI Benefit Fund contributions owed was \$5,238,854.54, for grand total of \$9,085,381.35.⁶ Of course, as Judge Locke recognized, this backpay figure will continue to accrue until Respondent remedies its unfair labor practices.

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⁶ While Judge Locke clearly held that both liquidated damages and interest were properly assessable against Triple-A on the amount of contributions to the Union's benefit funds (ALJD, p. 12-13), for some reason his Order did not reflect those calculations. *Id.* at 24. Charging Party has filed limited cross exceptions and is requesting that the Board correct this oversight.

E. Triple A's Exceptions.

Predictably, Respondent filed Exceptions to the Compliance Decision. Triple A's numerous Exceptions and arguments set forth in its lengthy supporting brief can generally be grouped into two broad categories. The first category is a retroactive challenge to both the Summary Judgment Decision, and the Compliance Specification on which that decision was based. Namely, Respondent argues, *inter alia*, that: (i) the Summary Judgment Decision is void because when it was issued, the Board was comprised of only two members (Exceptions 1, 2, 6, 16; Br.2-4, 42-48); (ii) the Board's Summary Judgment Decision allegedly "contained numerous errors of fact and law[;]" (Exceptions 2, 3, and 6; Br. p. 4-9); (iii) that Judge Locke erred by not finding that the Compliance Specification failed to state a claim upon which relief could be granted (Ex. 6-12; 15-20; Br. p. 10-36); and that (iv) Triple A's Answer to the Compliance Specification fully complied with Section 102.56(b) of the Board's Rules. Br. 36-41.

The second category is simply a kitchen-sink challenge to the entire Compliance Decision. For example, Respondent argues in its Exceptions, *inter alia*, that: (i) Judge Locke erred by awarding *any* backpay in this case at all (Exception 29; Br. p. 10-11, 15); (ii) Judge Locke also erred by ordering it to make *any* payments of delinquent benefits to the NASI Benefit Funds (Exceptions 4, 82-93; Br. p. 13-14); (iii) Judge Locke similarly erred by requiring Triple A to pay liquidated damages and interest on its delinquent contributions to the NASI Benefit Funds (Exceptions 4, 9, 82-89; Br. 30); and (iv) Judge Locke likewise erred in rejecting the affirmative defenses that Triple A actually litigated at the hearing. Exceptions 5, 22-23, 30-35, 41-48, 50-82; Br.34-36.

This Answering Brief is submitted in response to Triple A's Exceptions, and supporting arguments set forth in Respondent's brief.

III. ARGUMENT

Triple A's Exceptions should be rejected in their entirety. As we show below, Triple A's collateral attack on the Compliance Specification and the Board's Summary Judgment Decision in this case is improper and unfounded, and Judge Locke's Compliance Decision is firmly based upon both the credited testimony in the record, as well as applicable Board compliance precedent.

A. Triple A's Collateral Attack on Both the Third Amended Compliance Specification and the Board's Decision on Summary Judgment Should Be Rejected.

As discussed above, the formulae and computations establishing the gross amount of Triple A's financial liability for its violations of the Act, including the calculations of the gross amount of backpay, as well as the calculations of the gross amount of contributions to the NASI Benefit Funds, in this compliance case were conclusively established *prior to* the hearing by the Board's Summary Judgment Decision. *Triple A Fire Protection, Inc.*, 353 NLRB slip op. at 2. ALJD, p. 3-4; 6-8.

While that Decision conclusively established these particular issues in favor of the General Counsel and against Triple A for purposes of this compliance proceeding, many of Triple A's Exceptions and most of its Brief are devoted to a tardy, collateral attack on that decision.

For example, Respondent now argues that the Board's Summary Judgment Decision should be reversed because: (i) the Decision was issued when the Board consisted of only two members (Exceptions 1, 2, 6, 16; Br.2-4, 42-48); (ii) it allegedly contained numerous "errors" of fact and law (Exceptions 2, 3, and 6; Br. p. 4-9); (iii) the Decision "failed to state a claim for backpay upon which relief can be granted[,]" (Exceptions 7-8; Br. 2-10); and (iv) Triple A's

Answer to the Compliance Specification fully complied with Section 102.56(b) of the Board's Rules and Regulations. Br. 36-41.

Similarly, Triple A argues that the Compliance Specification itself was somehow legally deficient because, in Triple A's estimation: (i) the Specification failed to meet the requirements of Section 102.55(a) of the Board's Rules and Regulations by not alleging that each individual discriminatee had a "nonspeculative economic interest" in the NASI Benefit Funds (Exceptions 3,4,7,8,11,12 and 15; Br. p. 10-31); (ii) the Specification was allegedly based on the union security clause of the parties' expired CBA, and such provisions are illegal under Alabama law (Exceptions 10; Br. p. 32-33); (iii) the Specification was issued in error because Triple A claims that it does not owe any backpay to any of the discriminatees or to the NASI Benefit Funds (Exceptions 4,7,8; Br. p. 42); (iv) the Specification was also legally deficient because General Counsel had the burden of proving that the discriminatees had a "non-speculative economic interest" in the NASI Benefit Funds (Exceptions 7, 8, 15, 11, 12; Br. 38-40); and (v) the Specification was legally deficient because requiring Triple A to make contributions to the NASI Benefit Funds would be punitive and constitute a windfall to the NASI Benefit Funds and the employees. *Eg.* Exception 15; Br. 26.⁷ As we show below, all of these arguments lack merit.

First, and perhaps most importantly, Triple A simply ignores the fact that the Board has already rejected these arguments in its Summary Judgment Decision. In *Triple A Fire Protection*, 353 NLRB No. 88, Slip op. at 2, the Board specifically rejected Respondent's assertions that: (i)

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⁷ Triple A also excepted to the Executive Secretary's refusal to transmit Respondent's belated Motion for Reconsideration of the Board's Summary Judgment Decision to the Board for consideration. Exception No. 27; Br. p. 3. However, in its brief, Triple A failed to note that its Motion was extremely tardy under even the most liberal reading of Rule 102.48(d)(2), given that Triple A filed its motion *six months after* the Decision issued, and *four months after* the Compliance Hearing took place, rather than within 28 days of the date of the decision as the Board's Rules require. Accordingly, Respondent's Motion was properly rejected as untimely. *UFCW Local 1996*, 338 NLRB 1074, 1074 (2003).

the Specification failed to state a claim for relief because it did not "aver that any employee has a 'nonspeculative economic interest' in any of the funds[;]" (ii) the Specification was deficient because it did not allege that the Funds were mandatory subjects of bargaining; (iii) the Specification did "not state when any employee obtained an economic interest in any of the funds[;]" (iv) that the remedial order in this case was "punitive and will result in a windfall to each employee..." named in the Specification; (v) that the Specification was improperly based on the union security provisions in the expired Agreement; (vi) union security agreements are illegal under Alabama law; and (vii) Respondent simply owes no backpay or fringe benefit payments for its proven violations of the Act. Surely, if any of these arguments had merit, the Board would not have rejected them in the first instance.

The Board's decision rejecting these arguments is now the law of this case and, accordingly, the findings in that decision are not subject to challenge or relitigation here. *Jet Electric Co.*, 338 NLRB 650, 650 (2002)("We find as a matter of policy and sound procedure that, where summary judgment has issued and is undisputed, no purpose is served by second-guessing the Board's earlier decision."); *D.L. Baker*, 351 NLRB 515, 533–34 (2007)("We adopt the judge's finding and reaffirm that the Board's summary judgment Order established Tangy's gross backpay..."); *Lake Shore, Inc.*, 219 NLRB 1091, 1092 (1975).

Triple A also retroactively attacks the Compliance Specification by raising two *new* arguments in its brief, *i.e.* that the Specification is somehow legally defective because it failed to calculate backpay in quarters (Br. 11-14), and that Triple A's payroll records *now* allegedly show

⁸ Even if controlling precedent did not foreclose these challenges, Triple A introduced absolutely no evidence to support *any* of these contentions at the hearing. That was Triple A's burden; its failure to introduce evidence to support these defenses precludes the Board from considering them now. *Church Homes*, 349 NLRB 829, 838 (2007) (in compliance cases, a party raising an affirmative defense has the burden of proof on its defenses).

that some of the figures in the Compliance Specification might not have been accurate. Br. 2-10, 12-21. Respondent even tried to submit new evidence in support of these newly-minted arguments along with its Brief in Support of its Exceptions. Br. pp. 14-23; Appendices E-K. However, despite the fact the "evidence" upon which Respondent's new arguments are based – the Specification itself and Triple A's own payroll records – was in Triple A's possession for many, many years, Respondent never raised these defenses or arguments in its Answer, in its Opposition to Local 669's Motion for Summary Judgment, or at the Compliance Hearing. *See* Answer, GC Exh. 2(ii), 2(ss), 2(yy); R. Exhs. 1-11.

Thus, because Triple A had an obligation to raise these defenses and/or arguments earlier than in its Brief to the Board, the Board is precluded from considering them for the first time in Respondent's Exceptions and Brief. *K & E Bus Lines*, 255 NLRB 1022, 1029 (1981); *Laborers Local* 252, 233 NLRB 1358 fn. 2 (1977) (Where a defense is not raised in an answer or at a hearing but for the first time in its in its exceptions to the Board, it is clearly untimely).

Finally, we address Triple A's argument that the ALJ erred by failing to find that because the Board only had two members when it issued the Summary Judgment Decision in this case, the Decision is void under *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009). *E.g.* Exception Nos. 1 and 2; Br., p. 3. These arguments should be rejected, as according to Section 3(b) of the Act, 29 U.S.C. § 153(b), and decisions of the United States Court of Appeals for the Seventh, Fourth, Second, and First Circuits, the two-member Board that issued the Summary Judgment Decision constituted a proper quorum, and therefore the Summary Judgment Decision is not void. *See Regency Grande Nursing and Rehabilitation Center*, 354 NLRB No. 75, slip op. at 1, n.1 (September 3, 2009); *New Process Steel, L.P. v. NLRB*, 564 F.3d 840, 845 (7th Cir. 2009), *cert. granted*, 130 S.Ct. 488 (U.S. Nov. 2, 2009) (No.

08-1457); Narricot Indus. v. NLRB, 587 F.3d 654, 659 (4th Cir. 2009); Snell Island SNF LLC v. NLRB, 568 F.3d 410, 424 (2d Cir. 2009); Teamsters Local Union No. 523 v. NLRB, 590 F.3d 849, 852 (10th Cir. 2009); Northeastern Land Servs. v. NLRB, 560 F.3d 36, 41 (1st Cir. 2009).

In sum, the undisputed facts set forth above confirm that Triple A's arguments collaterally attacking the Summary Judgment Decision lack merit, and they should be rejected accordingly. Therefore, the gross backpay figures and NASI Benefit Fund contributions as alleged in the Compliance Specification are conclusive.

B. The ALJ Correctly Held That Triple A is Contractually Required to Pay Liquidated Damages Plus Interest on its Delinquent Fund Contributions Under the Terms of the 1988-1991 Collective Bargaining Agreement and Corresponding NASI Benefit Fund Documents.

In its Exceptions 4, 9, and 82-95, Triple A argues that the ALJ erred by requiring it to pay liquidated damages on the amount of fringe benefit contributions it owes to the NASI Benefit Funds as a result of its illegal, unilateral discontinuance of benefit payments. In its brief in support of its Exceptions, Triple A inexplicably gives this issue short shrift, and simply raises the conclusory argument that requiring Triple A to pay liquidated damages and interest would be "punitive" and not remedial in nature. *E.g.*, Br. p. 30. However, the undisputed evidence in the record in this case, viewed in combination with the applicable Board precedent, compels rejection of Triple A's Exceptions to this portion of Judge Locke's decision.

First and foremost, as Judge Locke correctly held (ALJD, p. 13), pursuant to the *Merryweather Optical* line of cases, as part of its make-whole remedies the Board routinely requires employers to pay additional amounts such as liquidated damages and interest, in order to make pension funds entirely whole for losses incurred as a result of an employer's unfair labor

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⁹ Of course, the United States Supreme Court has heard argument on the *New Process Steel* line of cases, and a decision is expected shortly that will conclusively resolve this particular legal issue.

practices, as long as the parties have agreed to such remedies in advance, and provided for them in their underlying collective bargaining agreement and governing benefit fund documents. *See Merryweather Optical Co.*, 240 NLRB 1213, 215 fn. 7 (1979); *Ryan Iron Works*, 345 NLRB 893, 895 (2005); *Hawk of Connecticut, Inc.*, 319 NLRB 1213, 1213 (1995); *Harris Glass Industries, Inc.*, 317 NLRB 595, 595 (1995); *Emsings Supermarket, Inc.*, 307 NLRB 421, 423 (1992); *American Thoro-Clean Ltd.*, 283 NLRB 1107, 1109-10 (1987). Put simply, liquidated damages and interest remedies are firmly established under NLRB law.

Here, the Compliance Specification contained *Merryweather Optical* remedial language as a part of the make whole remedy running to the NASI Benefit Funds in the underlying Board decision. GC Exh. 2(dd), p. 5, ¶12(b). ¹⁰ To that end, at the hearing, the Union introduced into evidence the following documents that were binding at all times upon the Parties on what Judge Locke referred to as the "liquidated damages" issue in this case:

- GC Exh. 3 is the 1988-1991 Agreement between Local 669 and Triple A, and is the contract upon which this compliance proceeding is based. Article 23 of the 1988-1991 Agreement expressly provides for recovery of costs of collection from the employer, *i.e.* liquidated damages and interest on delinquent contributions. CP Exh. 3; p. 22, Article 23; Tr. 36; 56-57.¹¹
- CP Exh. 1 is the Declaration of Trust for the NASI Pension Fund in effect during the 1988-1991 Agreement. The provisions for 20% liquidated damages and 12% per annum interest

¹⁰ Based upon the inclusion of *Merryweather Optical* language in the Compliance Specification, Triple A's argument that the Union should have been prohibited from introducing evidence in support of this particular remedy should be rejected. *See* Exception 4.

¹¹ As Mr. Jacobsen testified, liquidated damages "are monies that are added to delinquent contributions as an attempt to recover difficult-to-quantify damages when contributions are not made on time, either with investment losses or cost of collection." Tr. 57.

for delinquent contributions made to the NASI Pension Fund are set forth at page 26 of the Trust Agreement, as well as at page 2 of the First Amendment to that Agreement, and page 3, Sections VI and VII of the Guidelines for Participation of Contributing Employers in the Sprinkler Industry Trust Fund ("Guidelines for Participation"). CP Exh. 4.

- CP Exhs. 2(a) and (b) are the Declaration of Trust for the NASI Welfare Fund in effect during the 1988-1991 Agreement. The provisions for 20% liquidated damages and 12% per annum on delinquent contributions to the NASI Welfare Fund are set forth at page 26 of the Trust Agreement, as well as at page 2 of the First Amendment to that Agreement, and page 3, Sections VI and VII of the Guidelines for Participation. CP Exh. 4.
- CP Exh. 3 is the Agreement and Declaration of Trust for the NASI Education Fund in effect during the 1988-1991 Agreement. The provisions for 20% liquidated damages and 12% per annum on delinquent contributions to the NASI Education Fund are set forth at page 26 of the Trust Agreement, as well as at page 3, Sections VI and VII of the Guidelines for Participation. CP Exh. 4.

Furthermore, Judge Locke credited the testimony of Michael Jacobson, the Administrator for the NASI Benefit Funds since 1984 (Tr. 49), on the liquidated damages and interest principles applicable in this case. ALJD, p. 12. Mr. Jacobsen testified without dispute that the NASI Funds routinely assess and collect both liquidated damages and interest on delinquent contributions. Tr. 56-58; ALJD, p. 12. Mr. Jacobson also confirmed, once again without contradiction, that the Trust Agreements of the NASI Funds (CP Exhs. 1-4), in effect at all times relevant to this litigation, provide for the collection of liquidated damages on delinquent contributions owed to each Fund, at the rate of 20%, as well as interest on delinquent

contributions in the amount of 12% per annum, on contributions that are over thirty (30) days late. Tr. 58, 67. 12

Mr. Jacobson also testified, similarly without dispute, that not only was it routine practice for the NASI Funds to assess and collect liquidated damages and interest on delinquent contributions during the term of the Parties' 1988-1991 National Agreement, (Tr. 58-59; CP Exh. 5), but that the NASI Funds actually assessed and collected liquidated damages *against Triple A* for delinquent contributions before Respondent unlawfully discontinued participation in the Funds. Tr. 64-65; CP Exh. 6. In his decision, Judge Locke credited this testimony as well. ALJD, p.12.

To that end, Mr. Jacobson calculated the amount of liquidated damages and interest Triple A owed on the delinquent NASI Benefit Fund contributions set forth in the Compliance Specification in this case (Tr. 66-68), in the same manner that the Funds have routinely calculate liquidated damages, and in accord with the 1988-1991 Agreement. The liquidated damages figure from April 22, 1991 through March 23, 2009 totals \$1,054,084.20, while the interest figure for that same time period totals \$10,705,953.06. CP Exh. 7.

Importantly, Triple A chose not to introduce *any* evidence to contradict, discredit, or otherwise challenge either the underlying documentary evidence or witness testimony supporting the assessment of liquidated damages and interest on its delinquent benefit contributions in this case. Thus, the evidence establishing Triple A's obligation pay liquidated damages and interest, in addition to the amounts of the contributions it owes to the NASI Benefit Funds, stands unrebutted in the record below. *See Church Homes*, 349 NLRB 829, 838 (2007) ("in

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¹² Moreover, Mr. Jacobsen also explained that the Funds' collection procedures are more specifically set forth in the Guidelines For Participation, (CP Exh. 4) which, as Jacobson put it, "[s]ummarizes and adds some detail to the rules the trustees have promulgated..." Tr. 55, 57-58.

compliance proceedings the party offering an affirmative defense against the amount specified in a compliance specification has the burden of proving the mitigation of that amount. Here, the Respondent contends that the 20 percent ... is excessive, but has presented no evidence that a lesser amount would be sufficient to make the fund whole.")(*quoting Ryan Iron Works, Inc.*, 345 NLRB 893, 896 (2005).

Based on the foregoing, Judge Locke correctly held that not only did Triple A actually recognize its obligation to pay liquidated damages and interest in the past to these very Funds (ALJD, p. 12), but that

Respondent had agreed to the contractual provision requiring the payment of "liquidated damages" to the trust funds and thus this obligation had become a term and condition of employment. It concerned a mandatory subject of bargaining.

This term and condition of employment wasn't simply to pay a trust fund a certain specified amount for every hour worked by the bargaining unit employee. Rather, the term and condition of employment was that Respondent would make payments to the trust funds in accordance with its agreement. Failure to satisfy any particular obligation created by the agreement constituted a unilateral change in the term and condition of employment.

Thus, requiring Respondent to comply with the liquidated damages portion of its agreement is not punitive. Rather, holding Respondent to the terms of the agreement it made is necessary to restore the status quo ante. ALJD, p. 13.

Finally, if there can be any room left for doubt on this issue, *MFP Fire Protection, Inc.*, JD(SF)-51-03, 2003 NLRB LEXIS 464, **34-35 (Metz, 2003), *aff'd without exceptions*, NLRB Supplemental Order, Oct. 8, 2003, *enf'd*, No. 04-9504 (10th Cir. 2004), provides ample authority for requiring Triple A to pay liquidated damages and interest on the amount of contributions it owes the NASI Benefit Funds. That compliance case involved Local 669 and a different contractor, MFP Fire Protection, that also illegally and unilaterally reduced wages and unlawfully discontinued making contractually required payments to the NASI Benefit Funds as

required by the 1991-1994 Local 669 National Agreement. *See MFP Fire Protection, Inc.*, 318 NLRB 840, 843 (1995), *enf'd* 101 F.3d 1341 (10th Cir. 1996) (the underlying decision on which that compliance case was based).

In *MFP Fire* Protection, Administrative Law Judge Albert A. Metz held that, under *Merryweather Optical*, MFP Fire was required to pay liquidated damages and interest in addition to the amount of delinquent contributions, because such additional remedies were provided for in the NASI Benefit Fund documents – *i.e.* the very same NASI Benefit Fund documents in the record in this case. *MFP Fire Protection, Inc.*, 2003 NLRB LEXIS 464 at *35. Judge Metz's Decision and Order was affirmed by the Board (without exceptions), and enforced by the United States Court of Appeals for the Tenth Circuit. *Id.*

In sum, the ALJ properly credited Mr. Jacobsen's testimony, as well as the underlying documentation upon which it was based (ALJD, p. 12), and correctly concluded that Respondent agreed to pay liquidated damages upon delinquent contributions pursuant to its agreements with the Union, and that "... 'liquidated damages and interest' should be included as part of Respondents backpay obligation." ALJD, p. 12. "Thus, because the provisions in the governing documents of the Fund[s] clearly provide for specific liquidated damages [and interest], *Merryweather* dictates that the contractual terms be enforced." *Ryan Iron Works*, 345 NLRB at 895. Therefore, Judge Locke's decision was correct, and Triple A's Exceptions concerning this portion of his decision should be rejected.

C. Judge Locke Properly Rejected All of Triple A's Affirmative Defenses.

Triple A excepts as well to Judge Locke's rejection of the three affirmative defenses that Respondent chose to litigate at the hearing: (i) that Triple A would be unable to pay a judgment in the amount alleged in the Compliance Specification (Exceptions No. 23, 50-82); (ii) that its

backpay liability should be completely excused because the Union allegedly lost its majority status (Exceptions 30-35); and/or (iii) that its backpay liability should be excused because Local 669 allegedly abandoned the bargaining unit at Triple A. Exceptions No. 5, 22, 41-48. As we show below, after considering all of the evidence that Triple A presented on these issues at the hearing, Judge Locke correctly rejected all of these affirmative defenses in his decision.¹³

Triple A's "Financial Inability to Pay" Defense was Properly Rejected. 1.

With respect to this issue, we begin with the principle that, in compliance cases, a Respondent's alleged financial inability to pay cannot serve as an affirmative defense to eliminate (or even reduce) the monetary liability provided for in a compliance specification, because "the issue is the amount due and not whether [the Respondent is] able to pay." See Star Grocery Co., 245 NLRB 196, 197 (1979); Columbia Engineers, 268 NLRB 337, 337 (1983); ELC Electric, Inc., 348 NLRB 301, 302 (2006). Judge Locke recognized this principle in rejecting Triple A's financial inability to pay defense: "the evidence Respondent offered to support its inability-to-pay argument is immaterial to any issue properly before me and I reject Respondent's defense without regard to that evidence." ALJD, p. 10. Judge Locke's decision on this issue is soundly based upon well-settled Board law.

The foregoing legal impediments notwithstanding, even after Respondent was permitted to develop the record relating to this defense at the hearing (Tr. 140-141), Judge Locke held that, even if Board precedent permitted consideration of Respondent's ability to pay as an affirmative defense in compliance proceedings, the evidence that Triple A presented on the issue "...fell short of establishing such inability." ALJD, p. 10.

¹³ Respondent has abandoned any remaining affirmative defenses, not previously stricken by the Board, as to which it failed to introduce any supporting evidence at the hearing. The New Otani Hotel and Garden, 325 NLRB 928, 929 (1998).

Specifically, Triple A based its arguments on the testimony of two accountants, Jerome C. Olsen – Triple A's outside accountant since 1993 (Tr. 137-153: 196-202) – and James Hecker, an accountant who used to work for Mr. Olson. Tr.155-163. However, neither witness testified that Triple A could *never* pay the amounts set forth in the Third Amended Compliance Specification, and their testimony shed absolutely no light on Triple A's current and future financial condition because, as the ALJ recognized, they introduced no evidence to show that the figures and calculations they testified about were accurate, or were even what they purported to be. ALJD, p. 9-10.

For example, Respondent's Exhibits 6, 7, and 8 were simply "reviews" of Triple A's financial statements, prepared by Mr. Olson, for years ending 2006, 2007 and 2008, respectively. However, these exhibits were properly discredited by Judge Locke, because testimony about them confirmed that: (i) the documents were neither signed nor verified by Mr. Olson or any other accountant; (ii) "reviews" do not hold the same weight as an audit of Triple A's books would, in that no audit opinion on the veracity of a company's financial condition can be issued based on a "review" (Tr. 153); (iii) the "reviews" were prepared by Mr. Olsen -- Triple A's long-time accountant (Tr. 200-201) -- based *solely* upon "representations" made by Triple A to Olsen (Tr. 153); and (iv) to that end, Mr. Olson admitted that he did not even bother to take *any* test samples of Triple A's accounts in order to try and verify the figures that Triple A provided him in order to prepare his "reviews." ALJD, p. 10-11; Tr. 201.¹⁴

¹⁴ As Judge Locke concluded with respect to these exhibits at the hearing, the evidence was not sufficient to establish whether the figures in them were "...accurate, or have any relation to accurate figures..." Tr. 189. Accordingly, they were not received for the truth of any of the matters contained in them. *Id*

Respondent's Exhibits 4 and 10 were even more problematic for Triple A. Specifically, R Exh. 4 is a printout "summary" of selected accounting entries for Triple A from 2004-2008. However, this document was prepared by Mr. Hecker, based upon his review of unidentified "information" provided to him by Respondent's counsel – including documents that he admitted were *different* from those introduced into evidence in this case. Tr. 163-164.¹⁵

In his decision, Judge Locke correctly concluded this testimony "fell short of establishing such inability" because neither accountants' opinion was based upon "...evidence verified by audit conducted in accordance with generally accepted accounting principles. Rather, much of the information used by the accounts resulted from 'reviews' of the documentation which Respondent provided." ALJD p. 10. Specifically, the ALJ rejected Mr. Hecker's testimony because he concluded that Hecker "...made little effort to confirm the accuracy of the information Respondent provided him. It appears that a doubting and inquisitive attitude did not temper Hecker's analysis[,]" (ALJD, p. 10-11), and rejected Mr. Olson's testimony because his analysis was based "... on information supplied by Respondent, but, based upon the present record, I cannot conclude that such information was accurate and complete." *Id.* at 11.

Accordingly, Judge Locke held that "... Respondent bore the burden of persuasion that its witnesses, the accountants, based their opinions on accurate complete information about its financial situation. Respondent did not carry this burden." *Id*.

In its brief (Br. pp. 34-35), Triple A basically pays this issue lip service, citing to the Eleventh Circuit's Order in the underlying contempt proceedings in this case, reported as *NLRB v. Triple A Fire Protection, Inc*, 169 LRRM 3172 (11th Cir. 2002), which decision is equally unsupportive of this argument. Unlike compliance proceedings before the NLRB, where ability

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¹⁵ Thus, these exhibits was also not received for the truth of the figures contained in them because, as the Judge noted, there was "...no evidence that the figures are correct." Tr. 190.

to pay is *not* a defense to monetary liability resulting from the underlying Board order, inability to comply with a *court order* may be a defense to judicial proceedings seeking to hold a defendant in contempt of that court order. *Id.* at 3175 (*citing CFTC v. Wellington Precious Metals, Inc.*, 950 F.2d 1525, 1529 (11th Cir. 1992); *Citronelle-Mobile Gathering, Inc. v. Watkins*, 943 F.2d 1297, 1301 (11th Cir. 1991). While Triple A's argument may have had limited relevance in the contempt proceedings in the district court, it simply has no relevance in these compliance proceedings.

In sum, *even if* financial inability to pay was recognized by the Board as an affirmative defense in compliance proceedings, Triple A had its day in court, and came up short. Respondent's so-called evidence in support of its contention was properly rejected by Judge Locke, as it did not prove by a preponderance of evidence that Triple A will be unable to pay the amount of backpay in the Third Amended Compliance Specification.¹⁶

2. Triple A's Loss of Majority Status "Defense" was Also Properly Rejected.

Triple A also raised the arguments during the hearing that its liability for its proven unfair labor practices should be excused based upon the allegation that Local 669 somehow lost its majority status "on or before January 17, 1992 ... [,]" and/or that Local 669 lost its majority status on November 15, 1999 as the result of a "decertification petition" allegedly signed by a majority of Triple A's employees. Answer, p. 19; Tr. 91; 100-102. Although Triple A does not address this argument in its Brief in support of its exceptions, once again, the evidence confirms that Judge Locke appropriately rejected this defense.

¹⁶ Setting aside these evidentiary problems for a moment, R Exhs. 5-8 shows Triple A's accumulated earnings steadily *increasing* from \$359,975 in 2004 (R. Exh. 8) to \$1,874,057 in 2008. R Exh. 5. As Mr. Hecker testified, accumulated earnings demonstrate how viable a company is. Tr. 188. Thus, there is no question that Triple A continues to be a going concern, continues to perform sprinkler work, and continues to earn revenues that can be used to meet its attendant backpay obligations.

At the outset, we have been unable to find any case holding that an employer's obligation to financially remedy its unfair labor practices pursuant to a Board order can be eliminated based on a union's loss of majority status *subsequent to* the order establishing liability. Perhaps this is because, as Judge Locke correctly recognized (ALJD, p. 9), this argument ignores the long-settled rule that the Board will not entertain an employer's allegation that an incumbent union has lost its majority status when that allegation is made in the face of that employer's unremedied unfair labor practices that would tend to cause employee disaffection with the union. *E.g. Ohio Car & Truck Leasing, Inc.* 169 NLRB 198, 201-202 (1968), *enf'd* 415 F.2d 1375 (6th Cir. 1969); *Ethan Enterprises Inc.*, 342 NLRB 129, 133 (2004), *enf'd* 2005 U.S. LEXIS 24714 (9th Cir. 2005).¹⁷

In any event, Judge Locke held that the evidence that Respondent presented at the hearing came up well short of rebutting the continuing presumption of majority status that Local 669 enjoys at Triple A as the Section 9(a) representative of the bargaining unit. LJD, p. 9. Absent a disclaimer of interest, the Union's majority status can only be lost via either a decertification election or a lawful withdrawal of recognition. *See generally Levitz Furniture*, 333 NLRB 717, 720 (2001). It is undisputed that none of these actions took place in this case.

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¹⁷ As the ALJ correctly held (ALJD, p. 9), it cannot be seriously disputed that Triple A's unfair labor practices here -- unilateral reduction in wages and discontinuation of fringe benefits, coupled with Respondent's fifteen-year and continuing refusal to remedy these long-proven violations -- are *exactly* the type of violations that would tend to cause employee disaffection with the Union, and that disaffection would only be compounded by the fact that *none* of Triple A's Unfair Labor Practices have been remedied as of today. *Powell Electrical Mfg. Co.*, 287 NLRB 969 (1987), *enfd.* 906 F.2d 1007, 1014 (5th Cir. 1990) (unilateral implementation of contract offer without valid impasse contributed to employee disaffection and tainted petition). Thus, there is no legitimate way Local 669 could be held to have lost its majority status on the facts of this case.

The *only* evidence in the record supporting Triple A's "loss of majority" argument is that a decertification petition was allegedly filed in 1999. Tr. 91. However, this argument is particularly unavailing, given Triple A's admission at the hearing that Region 15 ultimately dismissed the decertification petition, and thus no decertification election was ever held. Tr. 91-92. And, even if a decertification petition allegedly filed in 1999 could have privileged the Respondent to withdraw recognition from Local 669 under the law as it existed pre-Levitz Furniture, Triple A admitted at the hearing that it never withdrew recognition from the Union. Tr. 102, 106.

Thus, Judge Locke correctly held that Triple A did not – and we submit, on this record, cannot – establish that Local 669 lost its majority status at any time.

Local 669 Has Not Abandoned the Bargaining Unit. 3.

Respondent's Exceptions 5, 22, and 41-48 argue that the ALJ incorrectly held that Local 669 did not abandon the bargaining unit at Triple A on or before January 17, 1992. 19 While Triple A has "abandoned" this issue in its brief to the Board, we address it as part of Respondent's overall challenge to the compliance decision.

Even at the hearing, Triple A did not present much by way of this defense. First, Respondent presented a letter dated March 16, 1999 - well after the date of alleged

¹⁸ Inexplicably, Respondent called no witness to testify about the Petition, and the Petition itself was not introduced into evidence. The only references to the decertification petition in the record are the unsupported representations made by Triple A's counsel. Tr. 91.

¹⁹ Triple A moved to "correct" its Answer to read on or after January 17, 1992. Tr. 110-112. Both the Charging Party and the General Counsel opposed this Motion at such a late date (Tr. 112-113), especially after Triple A consistently argued the "abandonment" occurred "on or before January 17, 1992" throughout its Answer to the Second and Third Amended Compliance Specifications GC Exh. 2(fff), p. 22 (dated 2005) and GC Exh. 2(ii), p. 20. Even allowing Triple A this last minute, self-serving "correction," the evidence in this case confirms that Local 669 has never abandoned this bargaining unit.

"abandonment" in Triple A's Answer – in which the Union notified Triple A's unit employees, *inter alia*, that

In 1991 your employer unlawfully attempted to 'break' the Union and refused to bargain with us by federal law. Over the past eight years Local Union 669 has fought hard at the NLRB and in federal court to protect the rights of Triple A employees, including your rights. Now Triple A will be required to restore these rights, pay back pay to victimized employees and bargain with Local 669. R. Exh. 3.

Local 669 submits that the Judge's observation during the hearing that "...the only conclusion [one] could draw from that letter is that the union definitely has not abandoned the unit[]" (Tr. 92), was on the mark.

Second, Triple A called two current and one former bargaining unit employees as witnesses, who simply testified that the Union never filed any grievances on their behalf. Tr. 118, 170, 178, 181. However, on cross examination, the witnesses admitted that they never asked the Union to file a grievance on their behalf, and that they never received any communications from the Union indicating that the Union no longer wished to represent them. Tr. 123; 176; 184-185. Indeed, it is worth noting that these very witnesses were not themselves "abandoned" – they are discriminatees in this case, whose terms and conditions of employment the Union has been fighting to restore since April 22, 1991. *See* GC Exh. 5, Employee Nos. 157, 57, and 367.

Accordingly, as ALJ Locke confirmed, the Employer's evidence falls woefully short of establishing anything other than since the Union filed the underlying unfair labor practice charge in this case against Triple-A nineteen years ago, "...the Union had sought justice on behalf of the

employees with remarkable tenacity." ALJD, p. 9.²⁰ Accordingly, Judge Locke's decision rejecting this defense is correct.

4. Triple A's Catch-all "Windfall" Defense was Likewise Properly Rejected.

Finally, Triple A argues that it should not have to pay *any* contributions to the discriminatees or to the NASI Benefit Funds with respect to any discriminatees who were not "vested" (*i.e.* obtained a non-speculative, economic interest in) the Funds, as such payments would constitute a "windfall" to either the Funds or the discriminatees themselves. Exceptions No. 11-12, 15, and 96-97; Br., pp. 2, 27, 38-40. In the event that the reader of the record somehow concludes that Triple A's "windfall" defense should be reconsidered, there are two independent and equally important reasons why this argument must be rejected in this case.

First, as the Board already determined in this case, Triple A's "windfall" argument is inapplicable in cases such as this, where an employer unilaterally and illegally discontinues the contractually-required payments to the Union's benefits funds, and the underlying Board Order results in a make-whole order running to *both* the employees *and* to the union's benefits funds. In cases such as this, the issue of whether the discriminatees have a vested interest in the funds does not even come into play. As the Board held on summary judgment, Triple A's argument is erroneously based

in part on the assumption that the Respondent is only required to make fringe benefit payments for employees who have a vested interest in receiving the benefits that the funds provide. However, the Board has never made such a distinction in awarding a makewhole remedy to benefit funds. Rather, if a respondent unilaterally stops making required payments to benefit funds on behalf of any employee, the standard remedy is to require that the funds be made

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²⁰ Similarly, the ALJ's observation that "[i]f the Union had abandoned the bargaining unit employees, as Respondent claims, it seems rather unlikely that it would have sent an attorney from Washington DC to Mobile Alabama to represent the employees' interests vigorously during the compliance proceeding[,]" is directly on point. ALJD, p.9.

whole for the missed payments, without regard to the "eligibility status" of the employees to actually receive benefits from the funds.

Triple A Fire Protection, Inc., 352 NLRB No. 88, slip op. at 3 (2009). And, as that issue has already been resolved against Triple A, it cannot be revisited here.

Triple A's reliance (Br. p. 30-32) on *Arandess Management Co.*, 337 NLRB 245 (2001) in support of this contention is misplaced, since that case dealt with the issue of whether a Respondent could be required to pay delinquent pension contributions as part of a make-whole remedy running to *strike replacement employees* who no longer worked for that employer. Here, however, it has been conclusively established for almost 15 years that there was *no strike* at Triple A, that *all* employees at Triple A employed on or after April 22, 1991 were, are, and continue to be simply unit employees, and that a separate make-whole remedy also runs to the Union's benefit funds. *Triple A Fire Protection*, 353 NRLB No. 88, slip op. at 2 (2009).

Second, and perhaps most importantly, Triple A presented absolutely *no* evidence at the hearing to indicate, let alone prove by a preponderance of the evidence, that the Board-ordered payments to the NASI Benefit Funds would result in a windfall to either the Funds or the discriminatees for *any* reason. Thus, Triple A's failure to present *any* evidence at all in support of its argument is fatal to this claim, and precludes the reduction of its monetary liability based on any "windfall" theory. *See Church Homes*, 349 NLRB 829, 838 (2007) (" in compliance proceedings the party offering an affirmative defense against the amount specified in a compliance specification has the burden of proving the mitigation of that amount. Here, the Respondent contends that the 20 percent ... is excessive, but has presented no evidence that a lesser amount would be sufficient to make the fund whole.") (*quoting Ryan Iron Works, Inc.*, 345 NLRB 893, 896 (2005)).

Therefore, Judge Locke's decision to reject Respondent's affirmative defenses is completely supported by the record below, and it should be affirmed accordingly.

IV. CONCLUSION

For all of the foregoing reasons, Charging Party Local 669 urges the Board to reject Triple A's exceptions in their entirety.

Dated: June 8, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 8, 2010, I electronically field Local 669's Answering Brief with the National Labor Relations Board, Office of Executive Secretary, and forwarded a copy by electronic mail to the Parties below:

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